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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1231

DEAN FRANCIS PACE,

Petitioner,

vs.

MARION ELENA PACE,

Respondent.

On Petition for a Writ of Certiorari to the California Supreme Court.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTIONS PRESENTED.

1. Whether there are adequate state grounds to support the dismissal of petitioner's appeal from the Interlocutory Judgment of Dissolution of Marriage by the California Court of Appeal, Second Appellate District?

2. Whether this Court will review a state court judgment resting on two grounds, where no opinion is rendered specifying which of the two grounds the judgment is based upon and where at least one of the grounds is a state ground adequate to support the judgment?

STATEMENT OF THE CASE.

Introduction.

The instant petition for writ of certiorari relates solely to the dismissal of petitioner's ("husband's") appeal from the Interlocutory Judgment of Dissolution of Marriage (the "Interlocutory Judgment") by the California Court of Appeal, Second Appellate District ("California Appellate Court"). Respondent ("wife") moved to dismiss the husband's appeal on two grounds: (1) that the husband had waived his right to appeal from the Interlocutory Judgment because he had accepted the benefits of that judgment, and (2) that the husband could not maintain any appeal from the Interlocutory Judgment because he was in contempt of the very orders from which he appealed. This case does *not* involve the constitutionality of the Family Law Act of California, California Civil Code §§ 4500 *et seq.* This case does not involve the validity or invalidity of the husband's contempt conviction. This case does *not* involve the husband's other appeals from the Interlocutory Judgment and subsequent orders of the Superior Court in and for the County of Los Angeles. Those issues were not decided or even considered by the California Appellate Court or the California Supreme Court, and are not relevant here. The only matters that can properly be considered are whether the California Appellate Court erroneously decided a substantial federal question in dismissing the husband's appeal from the Interlocutory Judgment, and whether the erroneously decided federal ground was necessary to the California Appellate Court's decision to dismiss the appeal.

Factual Background.

The Interlocutory Judgment was entered in the Superior Court in and for the County of Los Angeles, State of California on June 17, 1971. Pursuant to the terms of that Interlocutory Judgment, the husband, petitioner herein, was awarded a total of $17,178 from funds held by Latham & Watkins, attorneys for the wife, respondent herein. The husband was specifically ordered, by the terms of the Interlocutory Judgment, to pay, "forthwith," from the $17,178 he was to receive, attorneys' fees to Latham & Watkins in the sum of $1,000, court costs in the sum of $378, and a $2,200 community obligation of the parties. Subsequent to the entry of the Interlocutory Judgment, the husband demanded that the $17,178 held in trust by Latham & Watkins be immediately paid to him pursuant to the terms of the Interlocutory Judgment. As a result of such demand, on June 23, 1971, a Latham & Watkins attorney delivered the $17,178 to the husband. At that time, according to the sworn declaration which was filed in connection with the original contempt hearing (p. 16 of Appendix B), the Latham & Watkins attorney discussed with the husband the meaning of the word "forthwith" in the Interlocutory Judgment. As that declaration points out, the only reason the money was to be given to the husband first, and was then to be returned in part to Latham & Watkins and to other creditors, was that the husband, himself an attorney, had convinced the trial court judge that he should be permitted, as a matter of dignity, to pay the various obligations directly. For supporting documents, see pp. 11-29 of Appendix B.

After receiving the money, the husband refused to pay the specific community obligation that he had been ordered to pay, refused to pay the attorneys' fees, and refused to pay the court costs. As a result, on July 2, 1971, the wife, through her attorneys, filed an "Order to Show Cause and Declaration in Re Contempt" (p. 12 of Appendix B). On July 19, 1971, after a full hearing, Commissioner Reese of the Superior Court, who had presided over the original hearing on the Interlocutory Judgment, found the husband in contempt of court and ordered him to serve 15 days in jail, but suspended sentence on the condition that he pay the various sums owed the next day.

On July 20, 1971, the husband filed a writ of habeas corpus with the California Appellate Court which issued an order staying the execution of the contempt order. The writ was subsequently denied; the husband then filed a writ with the California Supreme Court, and that writ was denied.

Subsequent thereto, on August 2, 1971, Commissioner Reese ordered the execution of the sentence originally imposed July 19, 1971, and ordered that a bench warrant issue for the apprehension of the husband. The husband then filed various writs and motions attacking that order, including a motion to vacate, all of which were denied.

On July 19, 1971, petitioner filed in the California Appellate Court a notice of appeal from the Interlocutory Judgment. On September 24, 1971, the wife filed a "Notice of Motion to Dismiss an Appeal" (Appendix A), asserting that the husband could not maintain any appeal from the Interlocutory Judgment because he had accepted the benefits of that judgment and because he

was in contempt of the very orders from which he was appealing. After the opportunity for oral argument, the California Appellate Court dismissed the husband's appeal without specifying which one or both of the two grounds asserted by the wife was the basis upon which the motion to dismiss was granted. The husband then filed a petition for hearing (Appendix F) in the California Supreme Court, which was denied, and subsequent thereto, he filed the instant petition for writ of certiorari.

Reasons for Denial of the Writ.

I.

There Is an Adequate and Independent State Ground to Support the State Court Judgment and No Federal Question Has Even Been Raised With Respect Thereto.

The wife, in support of her motion to dismiss before the California Appellate Court, argued that the husband had waived his right to appeal from the Interlocutory Judgment because he had accepted the benefits of that judgment. It has long been established as a matter of California law that a party litigant cannot accept the benefits of a judgment and then appeal from it. In the wife's points and authorities, submitted to the California Appellate Court in support of ner motion to dismiss the husband's appeal, various California cases are cited for that proposition, including a long line of California Supreme Court cases: *Turner v. Markham*, 152 Cal. 246 (1907); *Shubert v. Reich*, 36 Cal. 2d 298 (1950); and *Storke v. Storke*, 132 Cal. 349 (1901) (a divorce case); see pages 7 and 8 of Appendix B. The husband has not contended that the dismissal of his appeal on this ground involves a federal question. Indeed, the husband has failed to even mention this issue in his petition for writ of certiorari.

Being solely a matter of California state law, this ground for the dismissal of the husband's appeal from the Interlocutory Judgment constitutes an adequate state ground to support the dismissal. It is a well-established principle that the Supreme Court will not review a state court judgment based upon a nonfederal ground which is independent of any federal ground and adequate to support the judgment. *Murdock v. Memphis,* 20 Wall. 590, 636 (1875); *Berea College v. Kentucky,* 211 U.S. 45, 53 (1908); *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935); *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1944). Thus, the order of the California Supreme Court denying the husband's petition for hearing to review the decision of the California Appellate Court's dismissal of the husband's appeal from the Interlocutory Judgment is nonreviewable because there is an adequate and independent state ground to support the state court judgment and no federal question has even been raised with respect thereto.

II.

The Dismissal of the Husband's Appeal From the Interlocutory Judgment Based on His Contempt of Court Does Not Raise Any Substantial Federal Question.

As shown by the points and authorities and various declarations that were before the various California courts, the husband, in essence, demanded that he be given money pursuant to the terms of the Interlocutory Judgment, and once receiving the money, then failed to adhere to the terms of the judgment. If the husband felt aggrieved by the Interlocutory Judgment, he could have appealed without demanding the various moneys held in trust by Latham & Watkins and without put-

ting himself in contempt of Court. He did not choose to do so. Instead, he demanded and received the funds pursuant to the terms of the Interlocutory Judgment and then willfully defied the Interlocutory Judgment. His contempt was upheld by three different courts, including the California Supreme Court. At every stage, the husband was given full opportunity to comply. In fact, even after delaying payment many months, a second judge gave him an additional opportunity to comply, which he chose not to utilize. When petitioner finally agreed to make payment, he had carried out his previous threat and had depleted the funds so that he could not then fully comply. Nevertheless, the husband's contempt sentence was suspended. In the meantime, the wife, in an effort to obtain her final divorce, had moved to dismiss the husband's appeal from the entry of the Interlocutory Judgment. This motion was granted on November 3, 1971 by the California Appellate Court. On November 4, 1971, a hearing was held to determine whether the husband had used his best efforts to pay the remaining amounts which he had been ordered to pay or whether he should be sent *back* to jail. The Court found that he was now using good faith efforts to comply with the Interlocutory Judgment. The Court did not find that the husband had cured his contempt. In fact, to this date, the total amounts that he was ordered to pay on November 4, 1971 still have not been paid in full. Under a long line of California cases, "A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to the legal orders and processes of the courts of the state." *Travis v. Travis,* 89 Cal. App. 2d 292, 293 (1948) quoting *MacPherson v. Mac-*

Pherson, 13 Cal. 2d 271, 277 (1939) (see also cases cited on pages 5 and 6 of Appendix B). This ground for dismissal raises no substantial federal questions, for it was held in *National Union of Marine Cooks & Stewards v. Arnold,* 348 U.S. 37 (1954), that state appellate review is not a requirement of due process and that a state supreme court did not deny an appellant due process where it dismissed an appeal because of appellant's failure to purge itself of contempt. This ground, then, also constitutes an adequate state ground to support the dismissal. There being no substantial federal questions raised by the husband with respect to either of the grounds upon which his appeal was dismissed, justice and equity demand that this petition be speedily denied so that the wife may finally obtain a final decree dissolving her marriage.

III.

If Either Ground Asserted by the Wife in Her Motion to Dismiss the Husband's Appeal Is Adequate to Support the Judgment, the State Court Judgment Is Unreviewable.

The wife moved to dismiss the husband's appeal from the Interlocutory Judgment on two grounds. Neither the California Appellate Court nor the California Supreme Court, however, issued an opinion specifying which of the two grounds urged by the wife was being relied upon in their dismissal of husband's appeal. However, it is well-settled that where the judgment of a state court rests on two grounds, and where there is a state ground independent of any federal question and sufficient to sustain the state court judgment, the Supreme Court will decline to take jurisdiction. *Johnson v. Risk,* 137 U.S. 300 (1890); *Eustis v. Bolles,* 150 U.S. 367 (1893). In *Lynch v. People of New*

York ex rel. Pierson, 293 U.S. 52 (1934), the Court held:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. . . . Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, *or if it does not appear upon which of two grounds the judgment was based,* and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. (*Id.,* at pp. 54-55) (emphasis supplied).

See also Williams v. Kaiser, 323 U.S. 471, 477 (1945). This is particularly true in view of the long-standing rule that, in the review of judicial proceedings, if the decision below is correct, it must be affirmed, even if the lower court relied upon a wrong ground or gave a wrong reason. *Helvering v. Gowran,* 302 U.S. 238, 245 (1937); *J. E. Riley Inv. Co. v. Commissioner of Internal Revenue,* 311 U.S. 55, 59 (1940); *Securities and Exchange Com. v. Chenery Corp.,* 318 U.S. 80, 88 (1943); *Brown v. Allen,* 344 U.S. 443, 459 (1953), *reh. den.* 345 U.S. 946 (1953). The wife has contended that a dismissal based upon the husband's acceptance of the benefits of the Interlocutory Judgment is purely a matter of the state law

of California and is independent of any federal question involved in this case and is adequate to sustain the judgment. The husband has not contended otherwise. The wife has further contended that a dismissal based on the husband's contempt does not raise any substantial federal question and is also an adequate state ground. Even if the husband had raised substantial federal questions with respect to the contempt ground, however, the existence of an adequate and independent state ground with respect to which no federal question has been raised precludes review of the state court judgment, even though no opinion has been rendered specifying which of the two grounds was being relied upon.

Summary.

The wife moved to dismiss the husband's appeal from the Interlocutory Judgment before the California Appellate Court on two grounds: (1) that the husband waived his right to appeal by accepting the fruits of the judgment and (2) that he could not maintain any appeal because he was in contempt of the very orders from which he appealed. Although neither the California Appellate Court nor the California Supreme Court ever rendered an opinion specifying which of the two grounds was being relied upon, the wife contends that either ground is adequate and sufficient to support the state court judgment. Further, the husband has not here or below presented any federal questions with respect to the first ground, that of acceptance of the benefits, and such ground constitutes an adequate and independent state ground to support the state court judgment. With respect to the wife's second ground, that of the husband's contempt, she contends that no

substantial federal question has been raised. Finally, if either of the two grounds urged by her is correct and is adequate to support the state court judgment, then this petition for writ of certiorari must be denied.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be denied.

Dated: June 6, 1972.

Respectfully submitted,

MAX L. GILLAM,
Counsel for Respondent,